No. 87-1830

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term 1987

LARRY BLALOCK,

Petitioner,

v.

METALS TRADES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

A. Did the petitioner timely file a petition for a writ of certiorari to challenge the decision of the Court of Appeals in Blalock v. Metals Trades, 775 F.2d 703 (6th Cir. 1985) filed October 24, 1985?

B. Did the Court below correctly apply this Court's decision in *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) to the case at bar by holding that the trial court's finding was not clearly erroneous?

DISCLOSURE OF CORPORATE AFFILIATION

Pursuant to Rule 28.1 of the Supreme Court it is stated that respondent Metals Trades, Inc., is not a parent company, subsidiary or affiliate of any other corporation.

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GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

I. OPINIONS BELOW

The case at bar was appealed on two separate occasions to the Sixth Circuit Court of Appeals. The first opinion was filed on October 24, 1985 and is reported at 775 F.2d 703 (6th Cir. 1985). The unpublished opinion following remand was filed on November 30, 1987, in Case No. 86-4021, (P. App. 1a).[1] A request for Rehearing With a Suggestion for a Rehearing *En Banc* was denied by the Sixth Circuit Court of Appeals on January 28, 1988. (P. App. 1a) The decision of the United States District Court for the Southern District of Ohio, Eastern Division was filed on October 10, 1986. (P. App. 13a)

II. JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). Petitioner properly seeks review of the second decision of the Sixth Circuit filed November 30, 1987, however this Court has no jurisdiction to review the decision filed October 24, 1985 since the petition was not timely filed.

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STATUTES WHICH THE CASE INVOLVES

28 U.S.C.A. § 2101(c)

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or

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[1]In this brief "P. App." denotes the appendix to the petition for certiorari.

proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

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STATEMENT OF THE CASE

Because petitioner is attempting to have this Court make a factual review of this case it is necessary to present in some detail the rather complicated facts presented in the trial of this matter.

At all times pertinent to this lawsuit, defendant Metals Trades was a corporation engaged in small metal fabricating, owned by two principal shareholders, Wendell Woodward and Arnold Brewer. (Wendell Woodward at TR II-3) Mr. Woodward was the president of the corporation while Mr. Brewer served as vice-president. (*Id.*) Messrs. Woodward and Brewer shared the management duties of the business including the hiring and firing of employees. (Wendell Woodward at TR II-7, 8, 9) Sometime prior to March 1974, John Rothacker, aware of an employment opportunity at Metals Trades, introduced plaintiff, who was then unemployed, to Wendell Woodward. (John Rothacker at TR I-64) Shortly thereafter, in March 1974, plaintiff began working for defendant primarily as a sales representative. (Larry Blalock at TR I-96)

The religious beliefs of plaintiff were not a prerequisite to his employment with defendant; (Larry Bla-

lock at TR I-142, 147) however, plaintiff was aware at the time he went to work for defendant that Wendell Woodward was a "born again" Christian who ran his company as a "Christian company." (Larry Blalock at TR I-98) Plaintiff also professed to be a practicing Christian and expressed his pleasure in working for a company that adhered to Christian principles. (Larry Blalock at TR I-147) At or before the time he began working for defendant, plaintiff asked for and was given permission to witness his faith to the company's clients or customers. (Larry Blalock at TR I-147)

Prior to Mr. Blalock's association with Metals Trades, both he and Wendell Woodward had independently become associated with John Rothacker. Mr. Woodward considered Mr. Rothacker to be his spiritual leader, "shepherd," or "apostle." (Wendell Woodward at TR I-7; John Rothacker at TR I-54) Although Woodward sought advice from Rothacker on all areas of his life, the final decision on every matter, including business, was always Woodward's. (Wendell Woodward at TR II-10) Both Mr. Rothacker and Mr. Woodward were associated with a small group of Christians who met on a regular basis. Mr. Rothacker had no involvement in Metals Trades; however, Metals Trades regularly gave him a portion of its income as a "company tithe." (Wendell Woodward at TR I-8, 9)

Prior to Mr. Blalock's employment with defendant, he too became acquainted with Mr. Rothacker and expressed his desire to study the ministry with him. (John Rothacker at TR I-57) For a short time, Mr. Blalock was an "understudy" of John Rothacker and followed him in

his ministry. However, shortly after Mr. Blalock began working at Metals Trades, Mr. Rothacker terminated his relationship with Mr. Blalock because of plaintiff's rebellious attitude and his refusal to submit to the authority of Mr. Rothacker in his ministry. (John Rothacker at TR I-62)

Approximately one month after plaintiff commenced his employment at Metals Trades, Arnold Brewer became dissatisfied with plaintiff's work and conduct. (Wendell Woodward at TR II-10; Arnold Brewer at TR II-55) He expressed this dissatisfaction to Wendell Woodward and indicated he was inclined to terminate plaintiff. (*Id.*) Wendell Woodward, although not fully satisfied with plaintiff's job performance and conduct, discouraged the termination of Mr. Blalock. Because Mr. Blalock was, like Mr. Woodward, a practicing Christian, Mr. Woodward wanted to make an extra effort to resolve their problems with plaintiff. (*Id.*)

On numerous occasions throughout plaintiff's employment at Metals Trades plaintiff failed to comply with procedural requirements of the job. For example, since plaintiff worked only part time he was asked to inform his employers in advance which days he intended to work each week. He often did not comply with this request. In addition, although he had permission to use the desks of Messrs. Woodward and Brewer, he often left them in an untidy condition. When these matters were brought to plaintiff's attention, he expressed a willingness to comply but then failed to actually comply. (Wendell Woodward at TR I-20; II-14; II-23)

At some time prior to plaintiff's being terminated, Mr. Woodward learned of the rift between Messrs. Roth-

acker and Blalock. On a few occasions Mr. Rothacker relayed messages to Blalock through their mutual friend Mr. Woodward. Mr. Woodward was personally disturbed by the conflict between his employee and his spiritual advisor. On at least one occasion Mr. Woodward told Mr. Blalock he wanted him to put an end to the "schism." (Larry Blalock at TR I-112)

It was often the case that morning prayer meetings were held at Metals Trades. Mr. Blalock attended many of these meetings; however, he was neither required to do so nor pressured into doing so. (Wendell Woodward at TR II-7) Attendance was not a requirement of his employment, nor was plaintiff subjected to any religious harassment during the term of his employment with defendant. (Larry Blalock at TR I-147)

During the course of plaintiff s employment at Metals Trades, Mr. Woodward became more and more dissatisfied with plaintiff because of what Woodward considered to be plaintiff's poor attitude toward his employers. Mr. Woodward felt that plaintiff was not following through in complying with the directions of Messrs. Woodward and Brewer. (Wendell Woodward at TR I-20) While reading the Bible, Mr. Woodward gained an insight into his problem with plaintiff when he read a passage about "feigned obedience." (Wendell Woodward at TR II-13) He realized then that plaintiff was engaging in "feigned obedience" in his work and that it was this behavior that was the source of the problem between plaintiff as an employee and his employers. (*Id.*)

Prior to his discharging plaintiff, Mr. Woodward discussed the matter of whether or not to terminate Mr.

Blalock with Mr. Brewer, who said he would concur in the termination of plaintiff if Mr. Woodward decided to so act. (Wendell Woodward at TR II-17; Arnold Brewer at TR II-56,57) Mr. Woodward also discussed the matter with Mr. Rothacker and their prayer group. (Wendell Woodward at TR II-16) Although Mr. Woodward looked to his friends for guidance in this matter, which was a difficult one for him, it was his decision, with Mr. Brewer's affirmation, to discharge plaintiff. (Wendell Woodward at TR II-9) Mr. Woodward believed that plaintiff's problem of feigned obedience manifested itself in both the secular and spiritual aspects of plaintiff's life, which, in Mr. Woodward's opinion, could not be separated. (Wendell Woodward at TR II-21,22) Two days before talking to Blalock, Woodward had made up his mind that if it came down to a point where he couldn't resolve anything with Blalock, he was going to let him go. (Wendell Woodward at TR II-18) When Mr. Woodward attempted to discuss the problem with plaintiff, he wanted to discuss plaintiff's problem in its entirety; and when the discussion began, it was Blalock who asked if it also involved John Rothacker. Since Woodward felt that one part of Blalock's life affected the rest also, he answered, "Yes." (Wendell Woodward at TR II-20 to 23) Mr. Blalock refused to talk to Woodward. (*Id.*) It was at this point that Mr. Woodward concluded that he could no longer work with plaintiff. His decision to terminate plaintiff was based on plaintiff's rebellious attitude, which, in Mr. Woodward's opinion, extended to all aspects of his life. (Wendell Woodward at TR II-21,22) He did not terminate plaintiff because of the religious beliefs he did or did not hold.

The trial court entered judgment for respondent and in so doing found that discrimination was at least a factor in Blalock's discharge, but, nevertheless concluded that Blalock failed to prove that in terminating him, Metals Trades intentionally discriminated against Blalock because of his religion or religious beliefs.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, which reversed on October 24, 1985. *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985). The Court of Appeals found that the case was one of mixed motivation; that although petitioner had shown that religion was a motivating factor in the discharge, the respondent had presented some evidence that it had discharged petitioner for legitimate nondiscriminatory reasons. The Court of Appeals held that after the petitioner presented evidence that one factor in the discharge was unlawful discrimination, the burden then shifted to the respondent to show by a preponderance of the evidence that petitioner would have been discharged even if there had been no discrimination.

On remand, the trial court heard no additional evidence but again found for respondent. The trial court concluded that

> . . . the defendant has proved by a preponderance of the evidence that Blalock would have been discharged at the same time absent the impermissible factor of religious discrimination.

(P. App. 27a) The trial court stated that even though religion played a part in the discharge, the petitioner was actually discharged because of the petitioner's poor job performance and insubordination towards his employers.

The case at bar was appealed again to the Court of Appeals for the Sixth Circuit, which affirmed the decision of the trial court. The Court of Appeals held by a two to one decision that the trial court's conclusion that defendant

> . . . had 'proved by a preponderance of the evidence that Blalock would have been discharged at the same time even absent the impermissible factor of religious discrimination' . . .

was not "clearly erroneous". (Per Curiam Opinion of November 30, 1987; P. App. 3a)

Petitioner filed a Petition for Rehearing which was denied on January 28, 1988 and subsequently filed this Petition for Certiorari.

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REASONS FOR DENYING CERTIORARI

I. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS WHICH PETITIONER CLAIMS TO BE IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW.

Petitioner has raised two separate questions in his petition for certiorari with the first question being whether the Court of Appeals was proper in concluding that respondent could escape all liability if it could prove by a *preponderance of the evidence* that petitioner would have been treated in the same way in the absence of discrimination; and the second question being whether the Court of

Appeals erred by not ruling that trial court's finding was not clearly erroneous.

The first question, concerning the respondent's burden of proof, was decided by the Court of Appeals in the first appeal, by decision filed October 24, 1985. *Blalock v. Metals Trades,* 375 F.2d 703 (6th Cir. 1985) On remand, the trial court applied the burden of proof standards dictated by the Court of Appeals and found in favor of respondent. Petitioner then appealed to the Sixth Circuit Court of Appeals a second time, however, this time the only issue raised was whether the trial court's finding as to whether respondent has sustained its burden of proof was *clearly erroneous.* The issue decided in the first appeal was in no way raised or made a part of the second appeal.

28 U.S.C.A. § 2101(c) clearly provides that

> . . . any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

This Court has stated

> . . . the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period which an appeal must be taken or a petition for certiorari filed begin to run.

Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 245,248,249 (1952)

Since the Court of Appeals in the second decision in no way modified the judgment in the first appeal concerning the "preponderance of the evidence" standard, a petition for certiorari to challenge the first Court of Appeals decision had to be filed within 90 days of October 24, 1985. Since this was not done, this Court has no jurisdiction to review the first judgment.

II. THE COURT BELOW PROPERLY HELD THAT THE TRIAL COURT'S FINDING WAS NOT CLEARLY ERRONEOUS.

Petitioner has suggested that this Court should grant certiorari because the holding of trial court was "clearly erroneous" under the standards of *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 105 S.CT. 1504 (1985)

What petitioner is asking this Court to do is what the Sixth Circuit Court of Appeals has already done—i.e., to review the record to determine if the decision of the trial court was clearly erroneous. Great weight must be given to the fact that two of the three judges at the appellate level were convinced that the trial judge did not make a mistake. (P. App. 1a)

Because the findings of the trial court were based on determinations regarding the credibility of witnesses, even greater deference to the trial court's findings is required. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985). Petitioner argues that the test put forth in *Anderson* is whether Woodward's statements are supported by objective evidence, however the test of *Anderson* is not whether a witness's testimony is supported by objective evidence, but rather whether it is contradicted by documents or objective evidence. The trial court found the evi-

dence was not contradicted, however, even if objective evidence does contradict a witness's testimony a finding is clearly erroneous only if it is clear that a mistake has been made by the trial court. (*Id.* at 575.)

As confirmed by the Court of Appeals, the trial court's ultimate conclusion was a permissive view, i.e., supported by the evidence.

> "Where there are two permissive views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).
>
> "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts."

Id. at 574.

All the petitioner is asking this Court to do is to duplicate the trial judge's efforts as well as the efforts of the three judges in the Court of Appeals. Respondent should not have to again prove what has already been twice decided. "As the Court has stated in a different context, the trial on the merits should be 'the "main event" . . . rather than a "tryout on the road." ' " *Id.* at 575.

Petitioner has failed to present any issues which merit the attention of this Court to merely provide a second review of the findings of fact of the trial court.

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CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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